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9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

11
12 David Pickett, a married man,
13 Plaintiff,
14 v.
15 Century-National Insurance Company,
16 Defendant.

17 No.: 2:19-cv-05108-MTL

18
19 **REPLY IN SUPPORT OF
MOTION TO DISMISS**

20 **(Oral Argument Requested)**

21 (Assigned to the Hon. John J. Tuchi)

22 Plaintiff has not established that the subject Policy's "Suit Against Us" provision,
23 which provides a one-year limitation period following the date of loss, is not applicable or
enforceable in this case. This matter is time barred because Plaintiff brought it more than
three-and-a-half years after the date of loss. Accordingly, this case must be dismissed with
prejudice, as further explained below.

24 **I. ARGUMENT**

25 **A. CNIC is not estopped from enforcing the "Suit Against Us" clause
26 because CNIC did not induce Plaintiff into delaying his lawsuit.**

1 In his Response, Plaintiff alleges without any factual or legal bases that CNIC
 2 somehow waived or is otherwise estopped from asserting its contractual rights under the
 3 Policy.¹ *See* Response at 5-8. Generally, Arizona courts will not permit an insured to bring
 4 a lawsuit in violation of a policy's limitations period unless the insurer is bound by waiver
 5 or estoppel. *See Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 142, 650 P.2d 441,
 6 444 (1982). This equitable exception only applies when the insurer's conduct during
 7 investigation and/or negotiations "induces its insured, by leading him to reasonably
 8 believe a settlement or adjustment of his claim will be effected without the necessity of
 9 bringing suit, to delay commencement of the action on the policy until after the limitation
 10 period has run." *Id.* An insurer does not waive its rights under the Policy when it
 11 investigates and/or negotiates, and then takes a final position on adjustment and indicates
 12 no willingness to go beyond that position. *See id.* (holding that an insurer was not
 13 estopped from raising a one year limitations period when it made a final offer for
 14 settlement, but continued to correspond with insured's counsel regarding the claim,
 15 because "it did not lead [insured's] counsel to reasonably believe that settlement for any
 16 amount above that figure could be effected without the necessity of bringing suit"). Once
 17 the insurer asserts a final position after investigation and/or negotiation, the insured only
 18 has a "reasonable time to sue after the promises or representations have ceased to justify
 19 delay." *Brewer v. Food Giant Supermarkets, Inc.*, 121 Ariz. 216, 217, 589 P.2d 459, 460
 20 (App. 1979) (holding that a personal injury plaintiff was time barred under the limitation
 21 period because even though the defendant's insurance adjuster reassured her that she

22 ¹ Plaintiff also seems to argue that because the subject Policy is a contract of "adhesion,"
 23 it is somehow unenforceable. *See* Response at 5. However, even assuming as true that this
 24 is a contract of adhesion, this argument fails because Arizona courts uniformly hold that
 25 "[c]ontracts of adhesion are not *per se* unenforceable." *Longnecker v. Am. Exp. Co.*, 23 F.
 26 Supp. 3d 1099, 1109 (D. Ariz. 2014) (citing *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 151, 840 P.2d 1013, 1016 (1992)). Thus, without more, the "Suit
 Against Us" provision remains valid and enforceable.

1 would be compensated without the need for litigation, she unreasonably waited sixteen
 2 months after the insurer's last communication before filing suit).

3 Here, Plaintiff argues that it would be "patently" unfair to allow CNIC to invoke
 4 the "Suit Against Us" provision because CNIC's investigation exceeded the one year long
 5 limitations period following the loss. However, this assertion ignores the basic facts that
 6 the investigation period was protracted in large part due to Plaintiff's failure to cooperate
 7 and provide the requested documentation—which ultimately led to CNIC's denial of the
 8 claim. *See Exhibit C to CNIC's Motion.* During the course of that investigation, CNIC did
 9 not engage in negotiations with Plaintiff, nor did it even indicate a payment was
 10 forthcoming while it investigated the claim. Rather, CNIC informed Plaintiff of potential
 11 coverage issues that warranted the investigation. *See Exhibit 6 to Plaintiff's Response at*
 12 5-6, 9; *see also Exhibit 9 to Plaintiff's Response.* CNIC also advised Plaintiff on
 13 numerous occasions that if he failed to cooperate, it could result in CNIC's prejudice and
 14 ultimate denial of his claim. *See Exhibits 6 and 9 to Plaintiff's Response.*

15 Thus, the holding outlined in *Zuckerman* that an insurer can be estopped from
 16 raising a period of limitations defense if it "induces its insured, by leading him to
 17 reasonably believe a settlement or adjustment of his claim will be effected without the
 18 necessity of bringing suit"—upon which Plaintiff relies in his Response—is inapplicable
 19 here. CNIC never once induced Plaintiff into believing that a settlement or adjustment was
 20 forthcoming while it investigated his claim. Accordingly, after CNIC denied his claim in
 21 May 2017, even though it was passed the one year limitation period, Plaintiff was only
 22 legally allotted a "reasonable time to sue" CNIC for breach of the Policy. *Brewer*, 121
 23 Ariz. 216, at 589 P.2d at 460. Instead, Plaintiff waited nearly two years to bring this
 24 lawsuit, which is certainly not reasonable or timely.

25 Even assuming *arguendo* that Plaintiff is correct that CNIC should be estopped
 26 from invoking the one-year limitation period, he has not presented any legal authority that

1 such an estoppel is indefinite or that CNIC forever waived the “Suit Against Us”
 2 provision. Indeed, such a standard would run contrary to the public policy allowing
 3 insurers to insert limitations provisions into their policies, namely that insurers should
 4 contractually be able to protect themselves from the prejudice of having to defend
 5 fraudulent or stale claims. *See Zuckerman*, 133 Ariz. at 143, 650 P.2d at 445; A.R.S. § 20-
 6 1115. Contrary to Plaintiff’s assertion, it would actually be “patently” unfair to
 7 permanently estop CNIC from invoking the “Suit Against Us” provision, because it has
 8 been nearly four years since the alleged date of loss and CNIC is clearly prejudiced, as
 9 explained below. If the Court was to find that CNIC should be estopped from relying on
 10 the one-year limitation period, that estoppel should only extend during the period of its
 11 investigation. This means that contractual limitation began to run on May 17, 2019, when
 12 CNIC issued its denial. *See Exhibit C to CNIC’s Motion*. Even under these circumstances,
 13 Plaintiff filed this lawsuit nearly than two years after his claim was denied, making it
 14 untimely under the “Suit Against Us” provision.

15 In short, Plaintiff has not established that CNIC should be estopped from invoking
 16 the “Suit Against Us” provision in the Policy. Accordingly, because Plaintiff brought this
 17 lawsuit three-and-a-half years after the date of loss, it is time barred and the Court lacks
 18 jurisdiction to hear it.

19 **B. CNIC is entitled to enforce the “Suit Against Us” clause because it is
 20 prejudiced by Plaintiff’s excessive and unreasonable delay.**

21 The only other way that an insured can escape a contractual limitation period is to
 22 show that the requirement works a “technical forfeiture” because the insurer was not
 23 prejudiced by the delay. *See Zuckerman*, 133 Ariz. at 143, 650 P.2d at 446. The courts
 24 determine whether there is prejudice based on the purpose of an insurance limitations
 25 period to prevent fraudulent claims and “promote justice by preventing surprises through
 26

1 the revival of claims that have been allowed to slumber until evidence has been lost,
2 memories have faded, and witnesses have disappeared.” *Id.*

3 Here, there can be no doubt that Plaintiff’s three-and-a-half year delay has
4 prejudiced CNIC. Plaintiff’s claim stems from alleged property damage that was the result
5 of a hailstorm that occurred in October 2015. However, the subject property has remained
6 exposed to the elements, including other various storms. Moreover, there was another
7 hailstorm that occurred in October 2010 before Plaintiff owned the residence, whose path
8 went over Plaintiff’s residence. This delay would make it difficult, if not impossible, to
9 determine when and how the alleged damage occurred. Additionally, any relevant
10 documents and records could be lost. Thus, CNIC is clearly prejudiced by Plaintiff’s delay
11 of bringing this lawsuit. *See Boesel v. State Farm Fire & Cas. Ins. Co.*, 565 Fed. Appx.
12 611, 612–13 (9th Cir. 2014) (finding that insured’s failure to provide insurer with
13 requested documents and contact information of relevant witness constituted substantial
14 prejudice and relieved the insurer of liability); *see also Warrilow v. Superior Court*, 142
15 Ariz. 250, 689 P.2d 193, 196–98 (App. 1984) (holding that insured violated a cooperation
16 clause and thereby prejudiced insurer by failing to provide insurer with information that
17 would aid the insurer in ascertaining its liability). Plaintiff, therefore, has not shown that
18 the “Suit Against Us” provision operates as a technical forfeiture in this case, meaning he
19 must be bound by the one-year limitations period.

20 **II. CONCLUSION**

21 Based upon the foregoing, namely that Plaintiff brought this action three-and-a-half
22 years after the date of loss in direct violation of the subject Policy’s “Suit Against Us”
23 provision, Plaintiff’s Complaint is time barred and the Court lacks subject matter
24 jurisdiction to hear it. Plaintiff’s Response does nothing to invalidate this contractually
25 agreed to limitation period. Accordingly, the Court should grant the Motion to Dismiss
26 with prejudice.

1 DATED this 4th day of October, 2019.

2 THE CAVANAGH LAW FIRM, P.A.

3 By: /s/ Levi T. Claridge

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5 Levi T. Claridge

6 Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and electronic copy to the following:

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